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SOME OLD PROBLEMS IN ENGLAND AND SOME NEW SOLUTIONS FROM VIRGINIA

1 Introduction

The fundamental ideal to which we aspire in the field of civil procedure is the perfect balance between expeditious results and correct results in the administration of justice. Two famous quotations from two famous English Equity judges come to mind. John Scott, Lord Eldon, the Lord Chancellor of Great Britain from 1801 to 1827,¹ who was often criticized for being excessively dilatory, said,² '*sat cito si sat bene*'.³ Sir George Jessel, Master of the Rolls from 1873 to 1883,⁴ once said, 'I may be wrong and sometimes am, but I never have any doubts'.⁵ Jessel had his docket under firm control, and he moved the cases before him to speedy conclusions to the general satisfaction of all concerned. Where the stakes are affordable, most clients prefer to have a quick resolution to their problems so that they can move on with their lives and affairs. Lawyers are more willing to wait a reasonable amount of time if the judge will carefully consider the reasons for his decision and publish a learned opinion which will be useful as a precedent for the future.

This problem is one truly worthy of serious study. Although the solution is beyond the wisdom and experience of this writer, I would like to offer a few thoughts for the benefit, *Deo volente*, of others. Part One of this essay points out one

¹ R.A. Melikan, *John Scott, Lord Eldon, 1751-1838*, Cambridge, Cambridge University Press, 1999, especially chapter 16; H. Twiss, *The Public and Private Life of Lord Chancellor Eldon*, 2nd edition, London, Murray, 1844.

² *Woolley v. Maidment* (House of Lords 1818), 6 Dow 257, at 276, 3 English Reports 1464, at 1470.

³ 'It satisfies quickly if it satisfies well'. Eldon was quoting Baron Shute in *Attorney General v. King* (Exchequer 1582), Savile 22, 123 English Reports 990, who was paraphrasing Caesar Augustus, who said '*Sat celeriter fieri quidquid fiat satis bene*'. Suetonius, *Lives of the Twelve Caesars*, chapter 2, section 25.

⁴ W.D.I. Foulkes, *A Generation of Judges*, London, Sampson, 1886, p. 171-182; G.R. Rubin, 'Jessel, Sir George', in A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law*, London, Butterworth's, 1984, p. 280-282.

⁵ *Dictionary of National Biography*, volume 10, Oxford, Oxford University Press, 1922, p. 805-807.

of the problems of the past. Part Two addresses methods of solution from the past. Part Three gives a suggestion for the future.

2 Sinecures: something to be avoided

In England in the seventeenth and eighteenth centuries, many public offices in the English Government had become sinecures, including many of the clerical officers of the courts of law. The holders were paid nominal salaries, if any at all, that had been fixed in the middle ages, but they supported themselves by fees that were, by ancient tradition, attached to the various services that they rendered. They held a life estate in their positions and had the right to exercise the office through a deputy. The problems were made greater by the custom of granting the offices in reversion,⁶ so that the rights to them were often vested well into the future. As time went by, these fees became very lucrative, so that the holder of the office could easily find a deputy to do the work for a modest salary or for a percentage of the fees and have a substantial amount of money left for himself. These sinecures were a means of rewarding faithful service to the King or to a high officer in the Government; they were equivalent to pensions.

Court clerks were put into office by patents, grants, and ceremonies similar to livery of seisin. In fact, their offices were incorporeal real property rights that were protected by the forms of action associated with real property.⁷ Thus, in the early nineteenth century, when the British Government began to rationalize its bureaucracy, including that of the law courts, it was necessary to begin by waiting for office holders to die or by purchasing these vested rights.⁸

One notable example of this was the office of the King's Remembrancer in the Court of Exchequer.⁹ The office of King's Remembrancer dates back to the middle ages; this officer was one of the senior clerks in the Exchequer, performing important clerical functions that were necessary for the procedure of the Court of Exchequer. The more important of the King's Remembrancer's duties were quasi-judicial. It was to him that all references in suits in Equity were sent.¹⁰ He settled disputes in the pleadings involving scandal and impertinence. Also he kept all moneys paid into court,¹¹ took accounts, examined certain witnesses, and kept exhibits and docu-

⁶ A reversion was a grant of something which was to begin upon the happening of a future event, usually the death of the present owner.

⁷ W. Blackstone, *Commentaries on the Laws of England*, volume 2, Oxford, Clarendon, 1766, p. 36; e.g., *Webb's Case* (1608), 8 Coke Reports 45, 77 English Reports 541; *Vaux v. Jefferen* (1556), 2 Dyer 114, 73 English Reports 251; Case 56, Jenkins 126, 145 English Reports 89; *Bagot v. Ive* (1469), Year Book Trinity 9 Edward IV, f. 6, placitum 2; *Garter King of Arms Case* (1466), Year Book Hilary 5 Edward IV, f. 8b, placitum 1.

⁸ E.g., Statutes 25 George III [1785], chapter 52; Statutes 57 George III [1817], chapter 60; Statutes 2 & 3 William IV [1832], chapters 110, 111.

⁹ See generally, W.H. Bryson, *The Equity Side of the Exchequer*, Cambridge, Cambridge University Press, 1975, p. 65-74, 186-191; G.A. Bonner, *The Office of the King's Remembrancer in England*, London, Butterworth's, 1930.

¹⁰ Rule 57, *Ordines Cancellariae*, London, Atkins, 1698, p. 55.

¹¹ House of Commons, *Session Papers 1810-11* (number 246), volume 3, p. 961 *et seq.* (p. 979-981).

ments brought into court. He attended the sittings of the court and took the minutes of the decrees and orders.¹²

Every time the King's Remembrancer did anything officially, he was entitled to receive a fee from the litigating party who needed this service. By the seventeenth century, the legal business of the Exchequer had increased to such a point that the office of King's Remembrancer was extremely lucrative. It was indeed sufficiently valuable so as to be a major source of income to support a noble family, the Fanshawes, who had made their way into the nobility by means of their connection to the Exchequer.

The office of the King's Remembrancer, even though it was by custom only granted for life, was kept in the Fanshawe family from 1565 until 1716, when the eldest branch died out. The first of the 'dynasty' was Henry Fanshawe (d. 1568), who began as a sworn clerk in the Queen's Remembrancer's Office and an Under-chamberlain of the Exchequer.¹³ On 12 December 1561, he managed to acquire a patent for the reversion to the office of Queen's Remembrancer upon the surrender of the same reversion, which had been previously granted to Francis Allen.¹⁴ He, no doubt, had bought out Allen's interest. Henry Fanshawe succeeded to the office according to his patent in 1565 when Thomas Saunder died. On 10 February 1567, Bernard Hampton was given the reversion to the office after Henry Fanshawe.¹⁵

Henry Fanshawe had no sons, but his nephew, Thomas Fanshawe (d. 1601), lived with him in Warwick Lane in London and was one of the sworn clerks in his office. Henry Fanshawe on 5 July 1568, only a few months before his death, bought out Hampton's interest in his office and got the reversion for Thomas.¹⁶ On 28 October 1568, Henry died and Thomas succeeded to the office of Queen's Remembrancer. Thomas Fanshawe was an active and competent man; it was he who really founded the fortunes of the family. Moreover, he was in office during the formative period of the Equity jurisdiction and was probably the man most responsible for settling the clerical procedures of the offices and for the beginning of the preservation of the court records. He is frequently mentioned in the law reports as having given advice to the court.¹⁷ He was a member of the Middle Temple and a member of Parliament in 1572, 1584, 1588, 1593, and 1597.¹⁸ Thomas Fanshawe's first wife, Mary Bouchier (d. 1578), whom he married sometime between 1566 and 1569, was

¹² House of Commons, *Session Papers* 1822 (number 125), volume 11, p. 99 *et seq.* (p. 113-114); *Compleat Clerk in Court*, London, Lacy, 1726, p. 151; Rule 30, *Ordines Cancellariae*, *supra* note 10, p. 31.

¹³ All of the genealogical information in this section comes from H.C. Fanshawe, *The History of the Fanshawe Family*, Newcastle-upon-Tyne, Reid, 1927; see also *Dictionary of National Biography*, volume 6, Oxford, Oxford University Press, 1922, p. 1047-1054.

¹⁴ *Calendar of Patent Rolls* [1560-63], p. 304.

¹⁵ *Calendar of Patent Rolls* [1566-69], p. 65, number 462.

¹⁶ *Calendar of Patent Rolls* [1566-69], p. 318, number 1864.

¹⁷ E.g., Case 36, Savile 14, 123 English Reports 992 (Exchequer 1582); *Puckering v. Fisher*, Savile 29, 123 English Reports 1005 (Exchequer 1583); Case 109, Savile 52, 123 English Reports 1007 (Exchequer 1583).

¹⁸ *Dictionary of National Biography*, *supra* note 13, p. 1053; J. and J.A. Venn, *Alumni Cantabrigien- ses*, part 1, volume 2, Cambridge, Cambridge University Press, 1922, p. 120.

the niece of Sir Walter Mildmay, the Chancellor of the Exchequer. Whether the Exchequer connection was the result or the cause of the marriage is unclear, but certainly, once the connections had been made, Mildmay and Fanshawe must have worked together very closely both in the Exchequer and in Parliament.¹⁹

On 1 May 1572 the reversion of the office was granted to Christopher (later Sir Christopher) Hatton (d. 1619).²⁰ Sir Christopher Hatton, the ultimate heir of his eponymous cousin, the Lord Chancellor, soon after married Alice, one of the daughters of Thomas Fanshawe.²¹ Thomas died in office in 1601 having neglected or failed to get a reversion for his son and heir, Henry (later Sir Henry) Fanshawe (d. 1616). However, Henry succeeded in getting a patent appointing him to the office within a month of his father's death.²²

On 14 July 1604 Sir Henry procured a grant of the reversion of the office to John Fanshawe, his first cousin who was a minor clerk in the office, and to Nathaniel Duckett, a cousin and a sworn clerk. They were to hold the office after his death in trust for his minor son Thomas Fanshawe (later first Viscount Fanshawe) (d. 1665). However, John Fanshawe died in late 1615 or early 1616 and Sir Henry followed him on 10 March 1616.²³ It was felt desirable to re-arrange the trust, and so on 21 March 1616 a grant was made to Sir Christopher Hatton with a reversion to Sir Arthur Harris, both grants being in trust for the children of the late Sir Henry Fanshawe.²⁴ Sir Arthur Harris was a first cousin of Thomas Fanshawe (d. 1665). The trust was necessary because an office could not be exercised by a minor.

Sir Christopher Hatton, being only the trustee of the King's Remembrancer's office, performed his duties through a deputy, John West, who was one of the sworn clerks. This was the beginning of the general employment of deputy King's Remembrancers. Hatton died on 10 September 1619; Thomas Fanshawe, the beneficiary of the trust, was then of age, and so a new grant was obtained on 22 September 1619. This was to Thomas with a reversion to Harris as trustee for the children of Sir Henry Fanshawe (d. 1616), i.e., the heirs presumptive of Thomas.²⁵ Thomas did not marry until 1627. By this time, the Fanshawes had begun to look on the office of King's Remembrancer more as a part of the family endowment than as an occupation. The deputy received a salary which was considerably less than the profits derived from the office.

Sir Thomas Fanshawe (d. 1665) had a son, Henry, who was born in 1630 but who lived less than four months. His second son, William, was born in 1631, and Thomas, his eventual heir, was born in 1632. As a result of the enlargement of his

¹⁹ *Genealogical Memoranda Relating to the Family of Mildmay*, London, no publisher, 1871, p. 8, 12; H.C. Fanshawe, *History of the Fanshawe Family*, *supra* note 13, p. 22.

²⁰ *Calendar of Patent Rolls* [1569-72], p. 339, number 2451.

²¹ H.C. Fanshawe, *History of the Fanshawe Family*, *supra* note 13, p. 27, 28.

²² This patent did not mention Hatton's interest, nor were any reversions granted.

²³ H.C. Fanshawe, *History of the Fanshawe Family*, *supra* note 13, p. 50-52.

²⁴ The date is given as 19 March 1616 in *Calendar of State Papers Domestic* [1611-18], p. 355, see also p. 357 (27 March 1616).

²⁵ The date is given as 17 September 1619 in *Calendar of State Papers Domestic* [1619-23], p. 78, see also p. 82 (2 October 1619).

family, Sir Thomas decided to re-arrange the settlement of the office. On 9 July 1631, he received a new grant to himself with reversions first to his brother Simon (later Sir Simon) Fanshawe (d. 1680), a sworn clerk, and then to Sir George Sands.²⁶ In 1641 Sir Thomas 'sold' the office to his youngest brother, Richard Fanshawe (d. 1666), who was later created a baronet. The arrangement was that Richard should be made King's Remembrancer and should account for the profits of the office to Sir Thomas and, if he would pay Sir Thomas £ 8,000 within seven years, then he should thereafter keep the profits for himself.²⁷ In accordance with this agreement a grant was made on 5 August 1641 to Richard Fanshawe with reversions to William (later the third baronet) Ayloffe (d. 1675) and then to Rowland Litton. William Ayloffe was a first cousin of Sir Thomas and Richard Fanshawe. The outbreak of the Civil War prevented Richard from paying the money to his brother. In 1644 Humphrey Salwey was made King's Remembrancer. The loss of the office to the Fanshawes was the result of their royalist loyalties. William Ayloffe petitioned unsuccessfully in 1647 to be made King's Remembrancer on the grounds that the 'delinquency' of Richard Fanshawe did not invalidate his reversion.²⁸ Salwey also seems to have had some trouble at this time, but he managed to retain his office.²⁹

Salwey was succeeded in 1654 by Francis Burwell, and he was succeeded in 1658 by John Dodington. Dodington was not well thought of by the barons, and they required him to find a deputy before they would admit him; two days later he was sworn into office, but the barons declared that there were plenty of precedents for not admitting incompetent people to public office.³⁰ It is interesting to note that no reversions were granted during the period of parliamentary control and the Interregnum. It was not until the nineteenth century, however, that reversions to offices were legally forbidden.³¹

In 1660, Parliament restored the Stuarts as Kings, and they restored the Fanshawes as King's Remembrancers. Sir Thomas Fanshawe (d. 1665) received a new grant dated 7 August 1660, which included reversions to his son Thomas (d. 1674), then to Vere Bertie, and then to Henry Ayloffe.³² Henry Ayloffe was the youngest brother of Sir William Ayloffe (d. 1675) and a cousin of the Fanshawes; he and Bertie were to hold the office as trustees for the Fanshawe family. By way of reward for his loyalties to the Stuarts and because of his hardships under Cromwell, Sir Thomas Fanshawe was created Viscount Fanshawe in September 1661. He died in March 1665, and his son Thomas (d. 1674) succeeded him as viscount and as King's Remembrancer.

²⁶ T. Rymer, *Foedera*, part 3, volume 8, 3rd edition, The Hague, no publisher, 1743, p. 221; *Calendar of State Papers Domestic* [1631-33], p. 102.

²⁷ A. Fanshawe, *Memoirs of Ann Lady Fanshawe*, London, Lane, H.C. Fanshawe (ed.) 1907, p. 29, 30.

²⁸ Historical Manuscripts Commission, *Report*, number 6, p. 209.

²⁹ See H. Salwey, *Lords' Journal*, volume 9, p. 518; volume 10, p. 117.

³⁰ Note, Hardres 130, 145 English Reports 415.

³¹ See Statutes 48 George III [1808], chapter 50; Statutes 50 George III [1810], chapter 88; Statutes 52 George III [1812], chapter 40.

³² *Calendar of State Papers Domestic* [1660-61], p. 208.

In 1674, a series of rather complicated legal manoeuvres began. In that year the second Viscount Fanshawe died having made a fairly sophisticated will providing for his family out of, *inter alia*, the profits of the office of the King's Remembrancer. Vere Bertie succeeded to the trusteeship of that office according to the patent. In the same year Lady Fanshawe sued Bertie, Ayloff, and Henry Fanshawe as executors of the will of the second Viscount Fanshawe or as a trustee for her jointure of £ 600 *per annum* payable out of the profits of the office.³³

In February 1675 Sarah Lady Fanshawe, the daughter of Sir John Evelyn and the widow of Thomas second Viscount Fanshawe, married George fifth Viscount Castleton.³⁴ Bertie resigned in June 1675 to become a Baron of the Exchequer, and Henry Ayloff became King's Remembrancer. Since the death of her first husband Lady Castleton had been very active in the interests of her family,³⁵ she succeeded by 25 November in having the office of the King's Remembrancer re-settled in a very complicated way in order to provide for her minor son, Evelyn, the third Viscount Fanshawe, and his heirs so that the profits of the office would continue to support the dignity of the peerage. This new patent granted a series of reversions to Henry, Charles, and Simon Fanshawe, the three uncles of the infant third viscount, in trust for him and his successors to the title; thus there was a slightly different succession provided for the legal and equitable estates in the office.

In 1675, Tobias Eden, the deputy King's Remembrancer, sued Charles Fanshawe, Sir Thomas Fanshawe, and Evelyn Viscount Fanshawe in order to be re-instated as deputy,³⁶ and he sued Bertie, the King's Remembrancer, for an accounting of money due to him out of the office.³⁷ In this same year, the trust in favour of Viscount Fanshawe was decreed in the case of *Evelyn Viscount Fanshawe by Sir John Evelyn, his next friend v. Sarah Viscountess Fanshawe, Bertie, Henry Fanshawe, Charles Fanshawe, Sir Thomas Fanshawe, and Eden*,³⁸ and the King's Remembrancer was ordered to make an account. This must have been a friendly suit for a decree to have been made within a year in such a tangled business. In 1676, there began an involved and drawn out suit over the profits of the office, the accounts to the beneficiaries of the trust, all of which was further complicated by the minority of Viscount Fanshawe: *Evelyn Viscount Fanshawe, an infant, by Henry Fanshawe his next friend v. Ayloff, Eden, Sir Thomas Fanshawe, and Charles Fanshawe*.³⁹ Connected with this suit was *Ayloff v. George Viscount Castleton, Lady Castleton, Evelyn Viscount Fanshawe, Henry Fanshawe, Charles Fanshawe, Sir Thomas Fanshawe, Eden, Atkins, and Eyres*,⁴⁰ in which Ayloff attempted by means of a bill of interpleader to have the deputy

³³ See Public Record Office, London (= PRO), E.133/52/8 and E.133/52/14.

³⁴ G.E.C., *Complete Peerage*, volume 3, p. 100; volume 5, p. 256.

³⁵ PRO S.P.44/46, p. 53 (10 October 1675); *Calendar of Treasury Books*, volume 4, p. 336, 340; H.C. Fanshawe, *History of the Fanshawe Family*, *supra* note 13, p. 120.

³⁶ PRO E.112/459/1193.

³⁷ See PRO E.133/49/28.

³⁸ PRO E.126/12, f. 141v-143v, 324, 329; E.126/13, f. 92v, 114; E.126/15, f. 306v-310; E.133/52/13.

³⁹ PRO E.112/458/1138; E.112/465/1604; E.126/13, f. 3, 37, 44v, 119, 199v, 127, 282.

⁴⁰ PRO E.126/13, f. 38v, 51v-53.

King's Remembrancer account directly to the beneficiaries of the trust. Aylofffe exercised his office by a deputy, and, since he held it in trust, he had to account to the beneficiaries for the profits; all of this litigation must have been extremely costly, and Aylofffe, no doubt, wanted to escape the inevitable entanglements of such suits in Equity, in which he had no significant interest. The result of the failure of this bill was another suit in the very next year: *Evelyn Viscount Fanshawe by Samuel Collins his next friend v. Aylofffe*.⁴¹ In 1687 Evelyn third Viscount Fanshawe died aged eighteen, and the litigation seems to have come to an end in 1689 with the decree in the suit of *George Viscount Castleton and Lady Castleton v. Charles Viscount Fanshawe, Sir Thomas Fanshawe, Atkyns, Aylofffe, Eyres, and Eden*.⁴² This tedious exposition barely scratches the surface of this mountain of litigation over the wills and estates, trusts and accounts in connection with the office of the King's Remembrancer in this fifteen-year period. There were other additional suits involving the same issues but with different combinations of parties.⁴³

The litigation over the family 'property' of the Fanshawes reflected the complicated dispositions and settlements then in general use to perpetuate assets of wealth, and in the devolutions of interests the inevitable occurrences of infancies lead readily to litigation. There is no evidence that the Fanshawe family suffered from animosities; they were merely involved in elaborate schemes of settlement which from time to time necessitated resort to the courts to straighten out ensuing tangles and to cure unforeseen troubles.

Returning to the office of the King's Remembrancer in 1687, we find Evelyn third Viscount Fanshawe dead unmarried; his oldest uncle, Henry Fanshawe, had predeceased him in 1685 also without issue. The beneficial interest in the office and the viscountcy therefore passed to Charles Fanshawe. In 1708, Henry Aylofffe died, and Charles fourth Viscount Fanshawe was the next reversioner in the patent.

However, Charles was a Jacobite and refused to swear the oath of allegiance to Queen Anne. He had been one of only three to speak in favour of King James II in Parliament in 1689 after James had fled from England, and in 1692 he had been arrested for high treason and imprisoned in the Tower of London.⁴⁴ He could not have been admitted to the office of Queen's Remembrancer without having sworn the oaths, and so his younger brother Simon, the next reversioner, brought a *scire facias* against him in Chancery for his refusal to act. Charles's reversionary rights were suppressed for non-user, and Simon was put into office.⁴⁵ A suit in the Exchequer determined that Charles had forfeited not only his rights to exercise the office under

⁴¹ PRO E.112/465/1628; E.126/13, f. 224, 323, 328, 329.

⁴² PRO E.112/712/2061; E. 126/15, f. 306v-310.

⁴³ A large number of office copies and bills of costs from these suits are now among the Finch-Hatton papers in the Northamptonshire Record Office.

⁴⁴ H.C. Fanshawe, *History of the Fanshawe Family*, *supra* note 13, p. 123; Historical Manuscripts Commission, *Report*, number 71, volume 4, p. 125, number 236 (6 May 1692).

⁴⁵ See PRO E.159/553 Michaelmas 7 Annae recorda rot. 122 in which Stevens was made custodian of the office *pendente lite*; the end of the litigation is recorded in PRO E.159/554, Trinity 8 Annae recorda rot. 48; *Samuel Dodd's Reports*, Durham, North Carolina, Carolina Academic Press, 2000, p. 220.

the patent but also his beneficial rights to the profits of the office under the trust.⁴⁶ Charles, an old bachelor, died in 1710, and Simon, also unmarried, became the fifth and last Viscount Fanshawe. He died in 1716; the title became extinct, and the office of King's Remembrancer went to the husband of Queen Anne's former favourite, Abigail Hill, later Lady Masham.⁴⁷

Many other examples from the various English courts of law could be given.⁴⁸ Because of such sinecures in the courts, there was an incentive to increase business in order to increase the fees, which went into private pockets. Thus, there was an incentive to delay action and to require unneeded services to be performed and, of course, paid for. Reform of the procedures of the courts was stifled wherever possible by the clerks, and serious procedural law reforms did not take place in England until after the sinecures had been abolished in the early nineteenth century. One of these reforms was to have the staff of the law courts paid fixed salaries that were not dependent upon the quantity of business in their court nor upon any fees collected by them on behalf of the court or of the State.

Today, we do not have sinecures within the court system, but the temptation to staff the clerical offices with incompetent persons for political and family reasons persists. Also, while security of tenure protects the court clerks from improper political pressures, it also protects incompetence and laziness.

A poorly run clerk's office, whatever be the cause, results in additional delay and expense in the litigation process. Whatever adversely affects the administration of justice, such as delay, affects access to the courts and must be guarded against.

3 The abolition of the writs and declarations of the forms of action: revolution or evolution?

The original procedure of the English courts of Common Law for initiating a lawsuit, an action at Law, was for the plaintiff to obtain a writ invoking the jurisdiction of the court and to file a declaration that set forth the facts that justified the suit or, in other words, facts that were the cause of the action.

The forms of action as a system of litigation originated in the royal courts of England in the twelfth century, a time when the courts of general jurisdiction were the county courts. The King's courts heard only special cases as a matter of the King's special favour to a particular plaintiff. Instead of going to the local court, an aggrieved party could obtain for a fee an original writ issued by the King's Chancery directing the royal court of Common Law to hear the case. The original writ gave the Common Law Court jurisdiction over the case.

Until the middle of the thirteenth century, the Chancery clerks were free to draft new writs to authorize new types of litigation or forms of action. However, it was felt that this was too much discretion to be reposed in the lesser bureaucrats;

⁴⁶ *Charles Viscount Fanshawe v. Simon Fanshawe*, PRO E.112/847/1441; E.112/850/1598.

⁴⁷ See PRO E.159/558 Hilary 12 Annae recorda rot. 8.

⁴⁸ See G.E. Aylmer, *The King's Servants: The Civil Service of Charles I, 1625-1642*, London, Routledge, 1961, p. 127, 129.

the power to issue new types of writs is the power to expand substantive rights, which is legislative action. In the mid-thirteenth century, this discretion was taken away from the Chancery clerks, and they were forbidden to issue new types of writs or to invent new forms of action.

By the middle of the thirteenth century, the local courts had declined drastically in usefulness and the royal courts of Common Law had become the principal courts of England, perhaps the only courts from a practical point of view. The plaintiff, in order to have an effective remedy in the Common Law Courts, must have been able to fit his problem into or within one of the fixed, established original writs or forms of actions. The generalizations or categories of litigation were called forms of action because each type of original writ dictated the type of process, the content of the declaration (the first pleading), the method of proof, and the type of remedy. The substance of the law itself was considerably influenced, if not determined, by the system of the forms of action.

Crucial to successful litigation was the plaintiff's initial choice of the correct form of action. The law of actions continued to develop after the thirteenth century. And as the old forms were used for new problems, the law developed countless historical distinctions, subtleties, and 'traps for the unwary'. In the nineteenth century, it was decided to put new wine into old bottles no more, and the forms of action were abolished in many Anglo-American jurisdictions.⁴⁹

The reason that litigation by means of the Common Law forms of action had survived so long was twofold. The changing needs of society were supplied by the action of trespass upon the case, which was a general form of action that was expandable. Secondly, the separate legal system of the Equity Courts handled the major problems of law reform until the nineteenth century.

By the end of the fifteenth century, the internal logic of the Common Law forms of action had developed the idea that all the Common Law was included within one or another form of action. A problem was remedied by a single form of action and no other; there was no overlapping. It was a single logical system of remedies, which did not give a plaintiff any choice of forms of action. This strict theory came to be modified in practice in a few narrow situations. Although ownership of real property could be protected in practice by writs of right or novel disseisin or ejectment, in theory each of these was quite different, being grounded on different substantive interests. In 1601, however, it was ruled that a plaintiff could elect to sue by way of an assize of nuisance or an action on the case.⁵⁰ In the next

⁴⁹ See generally J.H. Baker, *Introduction to English Legal History*, London, Butterworth's, 1990, p. 63-81; F.W. Maitland, *The Forms of Action at Common Law*, Cambridge, Cambridge University Press, 1936; F. Pollock and F.W. Maitland, *History of English Law Before the Time of Edward I*, volume 2, London, Cambridge University Press, S.F.C. Milsom (ed.) 1968, p. 558-573.

⁵⁰ *Cantrel v. Church* (King's Bench 1601), Croke (Elizabeth) 845, 78 English Reports 1072, Noy 37, 74 English Reports 1007.

year, it was decided in the court of King's Bench, that a promissory obligation for a sum certain could be enforced either by a writ of debt or a writ of assumpsit.⁵¹

It was enacted in Virginia in 1849 that '[i]n any case in which an action of trespass will lie, there may be maintained an action of trespass on the case'.⁵² The purpose of this Statute was to eliminate the problem of having to decide whether a tort had been committed directly or indirectly. However, the General Assembly, in removing one subtlety from the use of the forms of action, introduced a new one. A skilled pleader would avoid danger by always suing in case, but inasmuch as the Legislature did not simply make the two actions interchangeable, the unwary or ill-trained lawyer might sue in trespass and be met with a demurrer on the grounds that the tort alleged was an indirect one and that case was therefore the correct form of action.⁵³ In 1897, it was enacted that whenever an action of covenant would lie, the plaintiff might sue in assumpsit as an alternative.⁵⁴

These blurrings of the boundaries between the forms of action demonstrate that the ancient forms of action were categories that the practicing bar found to be inconvenient. Although a lawyer who was professionally competent could handle the forms of action and even manipulate them to his client's advantage, they were a product of an age of relative political and administrative impotence. The forms of action were archaic in the fifteenth century, the time of the rise of the Courts of Equity, in which pleading was begun by a simple and general subpoena and bill of complaint.

This system of litigation, which was medieval in origin, was seen as clumsy and archaic to the nineteenth century legal philosophers, and it was abolished by a single chop from the legislative guillotine in New York in 1848.⁵⁵ Writs and declarations were replaced by a simple form which was copied from the practice of the Equity Courts.

The legislative reforms of civil procedure resulted in anguish and provoked dissent following their enactment.⁵⁶ For example, although the Field Code was en-

⁵¹ *Slade v. Morley*, 4 Coke Reports 92, 76 English Reports 1074 (King's Bench 1602); J.H. Baker, 'New Light on Slade's Case', *Cambridge Law Journal*, 29, 1971, p. 51-67, 213-236; J.H. Baker, *Introduction to English Legal History*, *supra* note 49, p. 389-394.

⁵² Code of Virginia, chapter 148, § 7, p. 589 (1849); Code of Virginia, § 2901 (1887); Code of Virginia, § 6086 (1919); Code of Virginia Annotated, § 8-866 (1950); this section was finally deleted from the Code in 1977; see, e.g., *New York etc. R.R. v. Kellam*, 83 Virginia Reports 851, at 854, 3 Southeastern Reporter 703 (1887).

⁵³ W.J. Robertson, 'Address', *Virginia State Bar Association Reports*, 2, 1889, p. 85-94 (p. 86-87); Judge Robertson was correct, but in 1916 it was ruled that in an action of trespass, which should have been the case, the Statute of Jeofails cured the failure to sue in the proper form of action, because the declaration alleged sufficient facts for the court to proceed upon the merits: *Stonegap Colliery Co. v. Hamilton*, 119 Virginia Reports 271, at 279-280, 89 Southeastern Reporter 305 (1916).

⁵⁴ Virginia Acts 1897-98, chapter 96, p. 103; Code of Virginia, § 6088 (1919); Code of Virginia Annotated, § 8-508 (1950); this Act was repealed by Virginia Acts 1954, chapter 593, p. 765. 'Note', *Virginia Law Register*, 3, 1898, p. 829.

⁵⁵ New York Acts 1848, chapter 379, § 118, p. 521.

⁵⁶ J.C. Carter, 'Provinces of the Written and Unwritten Law', *Virginia State Bar Association Reports*, 2, 1889, p. 95-137 (p. 132).

acted in Florida in 1870, it was repealed three years later.⁵⁷ In England in the nineteenth century, the practicing lawyers were very much opposed to the abolition of the writs and the forms of action, as well as to procedural reform in general.⁵⁸

By contrast, this reform of Common Law pleading was accomplished in Virginia painlessly and imperceptibly over a two hundred year period. The first small step in Virginia was taken in 1705. In that year, an Act was passed by the General Assembly which allowed public creditors to obtain judgment against sheriffs or other collectors of public levies upon a simple 'complaint' to the court; the purpose of the Act was to protect the creditor from delay and 'a tedious law suit'.⁵⁹

In 1732, an Act was passed providing for various fees for the secretary of the colony and the clerks of the various counties; these fees were to be collected by the sheriffs of the counties. This Act further provided that, if a sheriff did not pay over the fees collected, the secretary or the clerk could go into court and 'upon a motion [...] demand judgment' for the sum due.⁶⁰ This appears to be the origin of the present day Common Law motion for judgment in Virginia. A similar remedy was given to the Treasurer of the colony in 1756⁶¹ and to High Sheriffs against their deputies in 1762.⁶²

It is to be noted that Common Law pleading by motion for judgment originated as a remedy for public officials against other public officers in relatively sim-

⁵⁷ Florida Acts 1873, chapter 1938, p. 15.

⁵⁸ Lord Chorley, 'Procedural Reform in England', in A. Reppy (ed.), *David Dudley Field Centenary Essays*, New York, School of Law, 1949, p. 98-119 (p. 99-100).

⁵⁹ Act of October 1705, chapter 9, § 8, 9, W.W. Hening, *Statutes at Large of Virginia* (= Hening's Statutes), volume 3, p. 266.

⁶⁰ Act of May 1732, chapter 10, § 8, Hening's Statutes, volume 4, p. 352; continued in force by Act of August 1734, chapter 10, § 9, Hening's Statutes, volume 4, p. 421, 422; Act of August 1736, chapter 10, § 9, Hening's Statutes, volume 4, p. 506, 507; Act of November 1738, chapter 10, § 11, Hening's Statutes, volume 5, p. 58; Act of February 1745, chapter 6, § 12, Hening's Statutes, volume 5, p. 344; Virginia Revised Code, chapter 115, § 13, 14 (1792); Virginia Revised Code, volume 1, chapter 85, § 22-25, p. 320-321 (1819); cf. Code of Virginia, chapter 184, § 22 (1849); Code of Virginia § 3519 (1887); Code of Virginia § 3499 (1919); Code of Virginia § 14-172 (1950); Code of Virginia Annotated § 14.1-175 (Replacement Volume 1978); see generally R.W. Millar, 'Three American Ventures in Summary Civil Procedure', *Yale Law Journal*, 38, 1928, p. 193-224 (p. 215-221).

⁶¹ Act of March 1756, chapter 1, § 5, Hening's Statutes, volume 7, p. 12; note also Act of February 1759, chapter 1, § 19, Hening's Statutes, volume 7, p. 263; Act of March 1761, chapter 7, § 4, Hening's Statutes, volume 7, p. 396; Act of November 1769, chapter 12, § 4, Hening's Statutes, volume 8, p. 346; Act of July 1775, chapter 5, Hening's Statutes, volume 9, p. 67; Act of October 1776, chapter 25, Hening's Statutes, volume 9, p. 222; Virginia Revised Code, chapter 84, § 7 (1792).

⁶² Act of November 1762, chapter 5, § 11, Hening's Statutes, volume 7, p. 543; Virginia Revised Code, chapter 80, § 27; chapter 161, § 1, 2 (1792); Virginia Revised Code, volume 1, chapter 78, § 32-34 (1819); Code of Virginia, chapter 49, § 40, 41 (1849); Code of Virginia § 909-912 (1887); Code of Virginia § 2835-2838 (1919); Code of Virginia Annotated § 15-520 through 15-523 (1950); Code of Virginia Annotated § 15.1-86 through 15.1-88 (Replacement Volume 1981); C. Robinson, *Practice in the Courts of Law and Equity in Virginia*, volume 1, Richmond, Shepherd, 1832, p. 616-619.

ple legal situations. Not only was the pleading in summary form, but so also was the trial, there being no trial by jury.

The remedy of motion for judgment was also found to be useful in quasi official situations in the eighteenth century. In 1748 private persons were first permitted to sue by motion on forthcoming bonds,⁶³ and in 1753 the general public was given the same remedy against sheriffs for the statutory fine for the failure to return a writ of execution.⁶⁴ It is interesting to note that this last mentioned Statute of 1753 was the first explicitly to call the pleading 'a motion for judgment'. An appearance bail or the sheriff where there was no such bail could have summary proceedings against a defendant for default of the defendant's appearance.⁶⁵ Not long after independence, if an attorney received monies on behalf of his client, he could be sued for them by motion in a similar manner to sheriffs, who had received public monies.⁶⁶

This procedure in 1710 was extended to purely private litigation for small debts; a private person could sue another private person by motion for judgment where the sum demanded was less than twenty shillings or two hundred pounds of tobacco.⁶⁷ Summary procedure for the litigation of small claims has been allowed in Virginia ever since.⁶⁸ In 1786 motion pleading was allowed to sureties against their principal obligors for exoneration and against their co-sureties for contribution.⁶⁹

⁶³ Act of October 1748, chapter 12, § 14, Henning's Statutes, volume 5, p. 534; Act of November 1769, chapter 3, § 3, Henning's Statutes, volume 8, p. 327; Virginia Revised Code, chapter 151, § 13 (1792); this appears to have been changed by Virginia Revised Code, volume 1, chapter 134, § 16, p. 530 (1819); see generally C. Robinson, *Practice*, *supra* note 62, p. 591-602.

⁶⁴ Act of November 1753, chapter 1, § 35, Henning's Statutes, volume 6, p. 344; Act of October 1791, chapter 3, § 5, Henning's Statutes, volume 13, p. 246; Virginia Revised Code, chapter 151, § 50, chapter 176, § 8 (1792); Virginia Revised Code, volume 1, chapter 134, § 47, p. 542 (1819); Code of Virginia, chapter 49, § 29 (1849); Code of Virginia § 901 (1887); Code of Virginia § 2826 (1919); Code of Virginia Annotated § 15-516 (1950); Code of Virginia Annotated § 15.1-81; C. Robinson, *Practice*, *supra* note 62, p. 610-613.

⁶⁵ Act of November 1753, chapter 1, § 19, Henning's Statutes, volume 6, p. 332; Act of October 1777, chapter 17, § 17, Henning's Statutes, volume 9, p. 406; Act of October 1788, chapter 67, § 29, Henning's Statutes, volume 12, p. 742; Virginia Revised Code, chapter 66, § 29, chapter 145, § 4 (1792); Virginia Revised Code, volume 1, chapter 116, § 4, 5, p. 461 (1819); Code of Virginia, chapter 146, § 6 (1849); Code of Virginia § 2893 (1887); Code of Virginia § 5777 (1919); Code of Virginia Annotated § 49-27.

⁶⁶ Act of October 1787, chapter 10, § 3, Henning's Statutes, volume 12, p. 473; Virginia Revised Code, chapter 71, § 7 (1792); Virginia Revised Code, volume 1, chapter 76, § 9, p. 269 (1819); Code of Virginia, chapter 164, § 10 (1849); Code of Virginia § 3200 (1887); Code of Virginia § 3427 (1919); Code of Virginia Annotated § 54-46.

⁶⁷ Act of October 1710, chapter 11, § 7, Henning's Statutes, volume 3, p. 508; St.G. Tucker (ed.), *Blackstone's Commentaries*, volume 4, Philadelphia, Birch & Small, 1803, Appendix, note E, p. 57-58.

⁶⁸ Act of October 1748, chapter 7, § 5, Henning's Statutes, volume 5, p. 491; Virginia Revised Code, chapter 67, § 5, 6 (1792); Virginia Revised Code, volume 1, chapter 71, § 20, p. 251 (1819); Code of Virginia, chapter 150, § 1-4 (1849); Code of Virginia § 2939-2942 (1887); Code of Virginia § 6015, 6020, 6022 (1919); Code of Virginia Annotated § 16.1-77, 16.1-79, 16.1-81, 16.1-93.

⁶⁹ Act of October 1786, chapter 15, Henning's Statutes, volume 12, 268-270; Virginia Revised Code, chapter 145, § 1, 2, chapter 175 (1792); Virginia Revised Code, volume 1, chapter 116,

At the turn of the nineteenth century, Judge St. George Tucker, who was the Professor of Law at the College of William and Mary, took a dim view of motion pleading, because it defeated the right to a jury trial at Common Law.⁷⁰ But the trend toward simpler pleading continued, and by 1832, when Conway Robinson published the first volume of his *Practice in the Courts of Law and Equity in Virginia*, the list of types of cases pleadable by motion for judgment was considerably expanded. It included, in addition to those already mentioned, the following: suits by a turnpike company against a delinquent shareholder, by the officers of the literary fund against Treasurers of school commissioners, and by jailors and creditors for jail fees, etc.⁷¹ The next major step in the development of motion pleading was taken in the year 1849. One of the many procedural reforms, which were inaugurated by John M. Patton and Conway Robinson, the revisors of the Code of 1849, was to allow motion pleading for all actions to recover money on any contract.⁷² This allowed motions for judgment as an alternative to writs and declarations in debt, covenant, and assumpsit. The primary significance of this step was that it was the first provision which allowed motion pleading for general types of problems. Patton and Robinson recommended this statutory change to the General Assembly because the earlier use of motions for judgment had been so successful in the limited situations where they were allowed; the revisors predicted that the use of motions would gradually take the place of the traditional modes of pleading.⁷³ Along with the general use of motions for judgment for money based on contractual obligations, the Code of 1849 provided that such actions could be tried by a jury if either party desired it.⁷⁴

The popularity of motion pleading for contract actions was retarded by the lengthy notice required, sixty days. In 1887 this was changed, and the Statute was amended to require only fifteen-days notice.⁷⁵ The remedy became quite popular once this delay was removed.⁷⁶

The general topic of procedural reform was in the air during the last fifteen years of the nineteenth century in Virginia. At their second annual meeting, which

§ 1, 2 (1819); Code of Virginia, chapter 146, § 6, 8 (1849); Code of Virginia § 2893 (1887); Code of Virginia § 5777 (1919); Code of Virginia Annotated § 49-27; C. Robinson, *Practice*, *supra* note 62, p. 604-607.

⁷⁰ St.G. Tucker (ed.), *Blackstone's Commentaries*, *supra* note 67, Appendix, note E, p. 56-63.

⁷¹ C. Robinson, *Practice*, *supra* note 62, p. 589-622, and statutes and cases cited therein; J.B. Minor, *Institutes of Common and Statute Law*, volume 4, Richmond, Anderson Bros, 1893, p. 1317-1324; see also H.St.G. Tucker, *Commentaries on the Laws of Virginia*, volume 2, Winchester, The Republican, 2nd edition 1837, p. 242, where motion pleading is given only a brief paragraph.

⁷² Code of Virginia, chapter 167, § 5 (1849); Code of Virginia § 3211 (1887); R.W. Millar, *Three American Ventures*, *supra* note 60, p. 193-224 (p. 216-219); see generally R.T. Barton, *Practice in the Courts of Law in Civil Cases*, volume 2, 2nd edition, Richmond, Randolph, 1891, p. 1037-1099.

⁷³ J.M. Patton and C. Robinson, *Report of the Revisors of the Code of Virginia*, Richmond, Shepherd, 1849, p. 832-833; quoted in *Wilson v. Dawson*, 96 Virginia Reports 687, at 691, 32 Southeastern Reporter 461 (1899).

⁷⁴ Code of Virginia, chapter 167, § 7 (1849); Code of Virginia § 3213 (1887).

⁷⁵ Code of Virginia § 3211 (1887).

⁷⁶ R.T. Barton, *Practice in the Courts of Law*, *supra* note 72, p. 1392-1393.

was in 1889, the Virginia State Bar Association threw itself into the middle of the codification question. The first presidential address was delivered by William J. Robertson on this subject. Robertson had been a judge of the Virginia Supreme Court of Appeals and had served there with distinction during the war and until he was removed by the Reconstruction Government for political reasons. He then practiced law with great success in Charlottesville and was honoured by being elected the first President of the Bar Association.⁷⁷ Robertson in his address advocated the adoption in Virginia of a code of pleading and practice similar to the Field Code of New York. Robertson specifically urged the abolition of the forms of action and the merger of Law and Equity procedure.⁷⁸ This address was clearly part of an organized discussion of the codification movement. The annual address at the same meeting was delivered by James C. Carter of New York, a nationally known scholar, who opposed the idea of general codification. Carter argued against the general codification of private law and criticized in passing the New York Code of Civil Procedure.⁷⁹ At the same meeting, the members of the Virginia Bar Association debated the question of whether Virginia should adopt the Field Code of New York.⁸⁰

This was the beginning of a lively debate throughout the State on the subject of law reform.⁸¹ The idea of a wholesale adoption of the Field Code was quickly dropped, and the discussion centred on two related proposals: the abolition of the forms of action and the merger of Law and Equity procedure. In 1891, a special committee of the Virginia Bar Association recommended that both of these steps be taken.⁸² In 1892, the Bar Association approved the recommendations of the committee.⁸³ However, when the committee presented its proposed draft bills to the Bar Association the next year, the general Code of Pleading, which included the abolition of the forms of action and the separation of Common Law and Equity procedure, and several miscellaneous proposals were defeated.⁸⁴

⁷⁷ A.C. Gordon, 'Judge William Joseph Robertson', in W. D. Lewis (ed.), *Great American Lawyers*, volume 7, Philadelphia, Winston, 1907-09, p. 129-159.

⁷⁸ W.J. Robertson, 'Presidential Address', *Virginia State Bar Association Reports*, 2, 1889, p. 85-95 (p. 90).

⁷⁹ J.C. Carter, 'Provinces of the Written and Unwritten Law', *Virginia State Bar Association Reports*, 2, 1889, p. 95-137 (p. 128, 132).

⁸⁰ *Ibidem* at p. 32-39. The abolition of the forms of action had been advocated two years earlier in 'Suggested Changes in Civil Procedure in Virginia', *Virginia Law Journal*, 11, 1887, p. 69-70, and in 'The Code Revision and Law Reform', *Virginia Law Journal*, 11, 1887, p. 124-125.

⁸¹ See S.S.P. Patteson, 'Law Reform', *Virginia Law Journal*, 13, 1889, p. 461-470, 677-687; 'Law Reform', *Virginia Law Journal*, 13, 1889, p. 475; S.C. Graham, 'Sacking the Temple', *Virginia Law Journal*, 13, 1889, p. 809-814; F.H. McGuire, 'Remarks on Pleadings in Virginia', *Virginia Law Journal*, 14, 1890, p. 21-25; S.S.P. Patteson, 'Law Reform - A Rejoinder', *Virginia Law Journal*, 14, 1890, p. 65-70; 'Remarks of S.S.P. Patteson', *Virginia State Bar Association Reports*, 4, 1891, p. 26-35; W.B. Pettit, 'Law Reform - A Rejoinder', *Virginia Law Journal*, 15, 1891, p. 681-687; S.S.P. Patteson, 'Law-Reform - A Sur-Rejoinder', *Virginia Law Journal*, 15, 1891, p. 745-750; W.B. Pettit, 'Law Reform - Reply to Sur-Rejoinder', *Virginia Law Journal*, 16, 1892, p. 1-8; J.R. Tucker, 'Address', *Virginia State Bar Association Reports*, 5, 1892, p. 85-107.

⁸² *Virginia State Bar Association Reports*, 4, 1891, p. 26-36, 44-69.

⁸³ *Virginia State Bar Association Reports*, 5, 1892, p. 22-36.

⁸⁴ *Virginia State Bar Association Reports*, 6, 1893, p. 14-62, 72-104.

Although these efforts towards procedural reforms were not immediately successful, the slow, careful, and deliberate pace of amendment and improvement continued. In 1912 it was enacted that any cause of action sounding in tort could be prosecuted by motion for judgment.⁸⁵ Also in the same year, this remedy was expanded in regards to contract litigation to availability 'to recover money [...] on any contract, or to recover damages founded upon any contract, or for the breach thereof, or to recover any statutory penalty'.⁸⁶ Four years later, suits for specific personal property or damages in lieu thereof and suits to 'recover damages in any action at law' could be prosecuted by motion for judgment.⁸⁷

From 1916 until the next revision of the Code, which occurred three years later, the only major subject of litigation where the alternative mode of pleading by motion for judgment was not available was the recovery of possession of real property. The use of the action of ejectment remained obligatory, but it was a form of action that had been radically altered by statute in 1849. The more bizarre aspects had been removed, the fictitious parties of record were replaced by the real parties in interest, and a judgment in ejectment was declared to be *res judicata*. The revised action of ejectment replaced all of the older real actions.⁸⁸

With the revision of the Code in 1919, motion pleading was made generally available as an alternative to the ancient forms of action pleading; after 1919 any civil Common Law cause of action could be brought by a motion for judgment.⁸⁹ (It is to be kept in mind that motion pleading does not affect the substance of the law or anyone's rights or obligations. It merely simplifies the procedure or method of presenting the issues to the court. The motion for judgment must still set out sufficient matter to state a cause of action.⁹⁰)

The alternative of motion pleading was judicially encouraged from at least as early as the turn of the nineteenth century. Judge Spencer Roane said from the Bench in 1797: 'I am strongly inclined to view notices with indulgence, seeing that they are the acts not of lawyers, but of the parties'.⁹¹ Although it was true at the time, as the century progressed, lawyers themselves used motions for judgment more and more, but happily the policy of looking favourably upon motion pleading

⁸⁵ Virginia Acts 1912, chapter 11, p. 15; this act was superseded and repealed as no longer needed in 1914: Virginia Acts 1914, chapter 18, p. 28, chapter 123, p. 203.

⁸⁶ Virginia Acts 1912, chapter 323, p. 651.

⁸⁷ Virginia Acts 1916, chapter 443, p. 760-762, which amended and re-enacted Code of Virginia § 3211 (1887).

⁸⁸ Code of Virginia, chapter 135 (1849); Code of Virginia § 2722-2759 (1887); Code of Virginia § 5451-5489 (1919); Code of Virginia Annotated § 8-796 through 8-835 (1950); Code of Virginia Annotated § 8.01-131 through 8.01-165.

⁸⁹ Code of Virginia § 6046 and Revisors' Note (1919); Code of Virginia Annotated § 8-717 (1950); repealed as no longer needed by Virginia Acts 1954, chapter 593, p. 765.

⁹⁰ E.g., *Security Loan & Trust Co. v. Fields*, 110 Virginia Reports 827, at 829-830, 67 Southeastern Reporter 342 (1910); *Felvey v. Shaffer*, 186 Virginia Reports 419, at 424, 42 Southeastern Reporter, Second Series 860 (1947); M.P. Burks, *Pleading and Practice*, Charlottesville, Michie, 1952, p. 290, 295; 13A Michie's *Jurisprudence*, 'Motions for Judgment', § 8-17.

⁹¹ *Drew v. Anderson*, 5 Virginia Reports (1 Call) 51, at 53 (1797); see generally R.W. Millar, *Three American Ventures*, *supra* note 60, p. 219-220.

continued.⁹² The Virginia Supreme Court of Appeals in 1920 grounded this policy on the more rational basis of preferring matters of substance to matters of form.⁹³ But still the old but useful myth (or legal fiction) survived.⁹⁴

With its simplicity, compared to the writs and declarations of the forms of actions and with the encouragement from the Judiciary, motion pleading quickly supplanted the traditional practice. In 1922, three years after the enactment of the general provisions of the Code of 1919, it was stated that '[t]he remedy by motion [...] is supplanting the regular forms of action, slowly in some localities and rapidly in others'.⁹⁵

In 1929, the Committee on Judicial Administration of the State of West Virginia published the results of an extensive survey of the use of motion pleading in Virginia. Their report included the following information about Virginia practice.

'The procedure under the motion for judgment has practically supplanted the common law pleading in Virginia. Our reports from the clerks of courts show that it is used in from ninety to ninety-five per cent of the cases. The common law procedure has become so rare as to be an oddity. This has happened in the past few years'.⁹⁶

'The motion for judgment procedure has practically supplanted the common law actions in all classes of actions, both in tort and in contract. The only exceptions are where there is a special statutory form provided, such as ejectment, and in cases of extraordinary remedy such as mandamus, prohibition, etc. There is a practically unanimous approval of this method of procedure among both bench and bar'.⁹⁷

Furthermore, federal procedure was required at this time to conform to the local State procedure. Not surprisingly, motion pleading spread to the federal District Courts in Virginia, supplanting the Common Law writs and declarations there also.⁹⁸ In 1944 the Virginia Supreme Court of Appeals noted that Common Law declarations had 'practically become obsolete'.⁹⁹

⁹² E.g., *Supervisors of Washington Co. v. Dunn*, 68 Virginia Reports (27 Grattan) 608, at 612 (1876); *Chesapeake etc. R.R. v. Washington etc. Ry.*, 99 Virginia Reports 715, at 721, 40 Southeastern Reporter 20 (1901). H. H. Fowler, 'Virginia Notice of Motion Procedure', *Virginia Law Review*, 24, 1938, p. 711-747.

⁹³ *Mankin v. Aldridge*, 127 Virginia Reports 761, at 767, 105 Southeastern Reporter 459 (1920).

⁹⁴ *Curtis v. Peebles*, 161 Virginia Reports 780, at 783, 172 Southeastern Reporter 257 (1934); *Ransone v. Pankey*, 189 Virginia Reports 200, at 207, 52 Southeastern Reporter, Second Series 97 (1949).

⁹⁵ C.H. Morrisett, 'Legislation of 1922 of Special Interest to Lawyers', *Virginia Law Register*, New Series, 8, 1922, p. 81-119 (p. 97).

⁹⁶ T.W. Arnold, J.W. Simonton and H.C. Havighurst, 'Report of the Committee on Judicial Administration', *West Virginia Law Quarterly*, 36, 1929, p. 1-102 (p. 67-68).

⁹⁷ *Ibidem* at p. 70-71. Note also S.S.P. Patteson, 'Judgment by Notice of Motion in Virginia', *Journal of the American Judicature Society*, 13, 1930, p. 167-168.

⁹⁸ *Chisholm v. Gilmer*, 299 U.S. 99, at 101-102 (1936); *Eley v. Gamble*, 75 Federal Reporter, Second Series 171, at 173 (4th Circuit 1935).

⁹⁹ *Shearin v. VEPCO*, 182 Virginia Reports 573, at 578, 29 Southeastern Reporter, Second Series 841 (1944).

From the safe position of retrospect, it would seem that prudence and caution in regards to one's clients' interests would dictate the immediate embracing of motion pleading wherever possible. Although some of the older members of the Bar being thoroughly familiar with and competent in the old ways were slow to change, the younger generation did in fact discard them without a second thought.

Having been totally superseded in practice, the forms of action lay dormant for two decades before being abolished in law. Although the writ of replevin had been taken away in 1823¹⁰⁰ and the writs of right, entry, and formed on in 1849,¹⁰¹ it was not until 1950 that the other Common Law writs were removed as possible alternatives to motions for judgment.

In 1950, pursuant to statutory authority of long standing,¹⁰² the Virginia Supreme Court promulgated a new set of Rules of Court that require *in personam* actions at Common Law for money to be sued only by motion for judgment.¹⁰³ The rule was amended almost immediately to rectify the oversight of actions to establish boundaries, for ejectment, unlawful detainer, detinue, and declaratory judgments (when at Common Law), which were then also to be pleaded exclusively by motion for judgment as required by the Rules of Court.¹⁰⁴ In addition, in order to assure the validity of the Rules of Court and, *inter alia*, to make explicit the abolition of the old writs and declarations of the forms of action, it was enacted in 1950 that, if a rule of court should be in conflict with a statute, the rule should prevail.¹⁰⁵ Four years later, the now superfluous Statute allowing motion pleading in lieu of pleading under a form of action was repealed and the Ejectment Statute was amended to substitute the words 'motion for judgment' for 'declaration' throughout.¹⁰⁶ The current Statutes are explicit that pleading is to be done according to the Rules of the Virginia Supreme Court.¹⁰⁷

And thus the procedural Common Law writs and declarations were abolished in Virginia practice, being replaced by the more simple motion for judgment. The transition was smooth and painless; this is always desirable in law reform, though it is infrequently attained. The success of this reform was due to its gradual introduction and to its availability as only an alternative at first. When the forms of action were abolished in 1950, no one noticed or was even aware that an eight-hundred-year old institution had been finally laid to rest.

¹⁰⁰ Virginia Acts 1822-23, chapter 29, § 9, p. 31.

¹⁰¹ Code of Virginia, chapter 135, § 38 (1849).

¹⁰² Code of Virginia Annotated § 8-1.1 (1950); Code of Virginia § 5960 (1919); Code of Virginia, chapter 161, § 4, p. 625 (1849); from 1916 to 1919 the Statute actually required the Supreme Court of Appeals to prepare a system of pleading (Virginia Acts 1916, chapter 521, p. 939), but no such action was taken at that time; see generally A.R. Bowles, Jr., 'The Course of Law Reform in Virginia', *Virginia Law Review*, 38, 1952, p. 689-698.

¹⁰³ Virginia Rules of Court, Rules 3:1, 3:3(a), 190 Virginia Reports xcix-c (1950).

¹⁰⁴ Virginia Rules of Court, Rule 3:1, 192 Virginia Reports lxxxix (1952).

¹⁰⁵ Virginia Acts 1950, chapter 1, p. 3; Code of Virginia Annotated § 8-1.2 (Replacement Volume 1957). With the recodification of the Civil Procedure Statutes, the former rule was restored, see Code of Virginia Annotated § 8.01-3(D).

¹⁰⁶ Virginia Acts 1954, chapter 593, p. 765-766; chapter 333, p. 424-425.

¹⁰⁷ Code of Virginia Annotated § 8.01-3(A), 8.01-271, 17-116.4.

Thus, the choice is always between quick, revolutionary, often dictatorial, change and the general unhappiness that comes from the inevitable dislocations and the constant danger of counter-revolution on the one side and, on the other side, slow progress towards the goal by evolutionary piecemeal steps, by trial and error, and trying again in the light of experience. This latter method is one of thoughtful change by a large number of persons directly concerned and by broad consensus.

4 Lawyers' participation in civil procedure reform: planning for the future

The problems of the procedures of the civil courts are of little concern to the general public, and this can also be said of most academic lawyers. However, to the practicing lawyers and to the judges, civil procedure is of daily concern. Therefore, the practicing lawyers and the trial court judges, whose professional lives are governed by the procedures of the court and who are the most knowledgeable therewith, are the persons who should guide the reforms and improvements thereof. The Legislature and the appellate courts must rely upon the collective experience of the practitioners and judges of the trial courts when they consider procedural changes.

This section describes several committees and commissions in Virginia which operate to effectuate the goal of procedural progress. Some of them are official; others are not. The general purpose of the bodies described herein is to consider proposals for civil procedure reform in light of the opinions of lawyers and judges who have had significant experience in civil litigation and who represent as many different constituencies as possible. Those organizations whose primary purpose is the self-serving promotion of the financial interests of their members will not be considered.

4.1 *The Advisory Committee on Rules of Court*

The Judicial Council of Virginia is a statutory body that exists within the judicial branch of the Government of Virginia.

'The Judicial Council [is] be composed of fourteen members consisting of the Chief Justice of the Supreme Court [of Virginia], one judge of the Court of Appeals [of Virginia], six circuit court judges, one general district court judge, one juvenile and domestic relations district court judge, two attorneys qualified to practice in the Supreme Court, and the chairmen of the Committees for Courts of Justice of the Senate and the House of Delegates. The Council may appoint committees to aid it in the performance of its duties, and members of such committees need not be members of the Council'.¹⁰⁸

One of its committees is the Advisory Committee on Rules of Court. The membership of this Committee is carefully balanced to provide as many different professional points of view as possible within the general area of court procedure at all

¹⁰⁸ Code of Virginia Annotated § 17.1-700.

levels of court. There is one judge from each level of court except the Supreme Court of Virginia. There is a Public Prosecutor and a prominent criminal defence lawyer. There are several trial lawyers and a clerk of court.¹⁰⁹ The executive secretary of the Supreme Court of Virginia is also a member, as are two Professors of Law who teach Virginia Civil Procedure. These are experienced and successful lawyers with a deep knowledge of the practice of law in the various courts.

After careful study of proposals for procedural reforms from whatever source, this Committee drafts proposed general Rules of Court and, following an opportunity for public comment, recommends them or not to the Judicial Council. The Judicial Council, which is composed of various officials of State Government reconsiders the proposals and recommends them or not to the Supreme Court of Virginia. The Supreme Court of Virginia has statutory authority¹¹⁰ to promulgate general Rules of Court for all of the courts of Virginia.

4.2 *The Civil Litigation Section of the Virginia Bar Association*

The Virginia Bar Association was formed in 1888 as a voluntary organization of Virginia lawyers. One of its founding purposes was to work for law reform.¹¹¹ One of its sections is the Civil Litigation Section, whose members are trial lawyers who have a civil, as opposed to criminal, practice. The leadership of the Virginia Bar Association appoints an executive committee, or council, for this Section. The members of the council are experienced civil litigators, trial judges, and Law Professors, and they serve for three-year terms. This council receives suggestions for civil procedure reforms from the general membership of the Association, forms sub-committees to study the meritorious ones, and makes recommendations or not for changes in Rules of Court and for statutory changes. By not having a static membership, the Civil Litigation Section is constantly receiving new ideas and suggestions for improvement in the area of law reform. Continuity is maintained by having staggered terms of membership and by having the Law Professors as permanent members.

4.3 *The Boyd-Graves Conference*

The Boyd-Graves Conference is a completely idiosyncratic collection of trial lawyers who are dedicated to law reform in the area of civil procedure. (Because many

¹⁰⁹ The clerks of court in Virginia are elected by the general public; they are in charge of all of the records of the trial courts. Constitution of Virginia (1971), Article VII, § 4; Code of Virginia Annotated § 17.1-208 *et seq.* Without the clerks of court and their staff, the courts could not function at all. Thus many problems of court procedure involve court records and their custodian, the clerk of court.

¹¹⁰ Code of Virginia Annotated § 8.01-3.

¹¹¹ The Virginia Bar Association is a totally separate organization from the Virginia State Bar, which is a part of the judicial branch of the State Government. Code of Virginia Annotated § 54.1-3910. Since all Virginia lawyers are required to be members of the Virginia State Bar and are required to make substantial financial payments for its maintenance, the Virginia State Bar and its committees are forbidden to lobby for anything, including law reform.

members of the Boyd-Graves Conference are also very active members of the Virginia Bar Association, that latter organization voluntarily lends its administrative staff for arranging accommodations for the annual meeting of the Boyd-Graves Conference.) This Conference has no corporate existence; it is a group of lawyers plus some judges and legal academics, who meet once a year to discuss civil procedure reform. Its origin is very telling.

Thomas V. Monahan, a very successful trial lawyer from Winchester, Virginia, and a former President of both the Virginia State Bar and the Virginia Trial Lawyers Association, was a serious and thoughtful advocate of civil procedure law reform. However, the Virginia State Bar was forbidden to lobby for anything, and the Virginia Trial Lawyers Association had become a self-interested advocacy group under the control of the plaintiffs' personal injury lawyers. Law reform requires an impartial and disinterested approach because it affects a wide population.

Therefore, in 1978, Monahan invited a group of trial lawyers to meet him for a weekend at The Tides Inn in Irvington, Virginia, to discuss informally various issues of civil procedure and to play some golf on a very nice golf course. The meeting was a great success, and they agreed to return annually. Thus, the group was known as The Tides Inn Conference. The persons invited were chosen carefully so that there would be an equal number from the plaintiffs' bar and from the civil defence bar in order to prevent self-interest from prevailing; furthermore, The Tides Inn Conference made no recommendation unless the consensus was unanimous or nearly so. Thus, the recommendations represented the agreement of both sides of the personal injury practitioners' bar. Such a consensus of well-known trial lawyers had great weight and influence with the Judicial Council and with the General Assembly in the area of civil procedure reform.

Soon after its founding, Monahan increased the size of the invitation list by including a few legislators, trial judges, and Law Professors, and the Conference outgrew the accommodations of The Tides Inn. Now, the Conference has about one hundred members and meets in different places in Virginia each year. The increased size has necessitated the institution of an executive committee and *ad hoc* subcommittees to study various problems and to make recommendations to the annual general meeting. In 1985, Edward S. Graves, of the Lynchburg Bar and an adjunct Professor of Virginia procedure, and Professor T. Munford Boyd, Professor emeritus of Virginia procedure and an active practitioner in Charlottesville, both died. They had been leading members of The Tides Inn Conference, which by then was no longer assembled at The Tides Inn, and the group was renamed the Boyd-Graves Conference in their honour.

The success of the Boyd-Graves Conference in accomplishing law reform has been the result of several things. The equal membership of both sides of the litigation bar assures that both sides are in agreement with a proposal. The justices of the Supreme Court of Virginia and leading lawyers in the General Assembly are invited; although few of them ever attend, these persons who have the political power to make the proposals of the Conference law are given the opportunity to participate.

The rules of the procedure of the Conference are not rigidly fixed and followed so that a small, well-organized clique cannot take over and manipulate the Conference.

rence. The rule of unanimity, or near unanimity, ensures that any proposed reform is very broadly approved by all parties, but a single dissenter cannot manipulate or defeat a general consensus.

The major criticism of the Boyd-Graves Conference is that its agreed-upon proposals involve only small, highly-technical points of civil procedure. The response to this point, which is true, is that small procedural reform can make the system work more smoothly and with fewer resorts to a judge as to interlocutory procedural matters. To reduce the routine costs and to reduce delay in litigation is to increase access to the courts, as a practical matter, for all members of the general public. This is a good thing.

These Virginia institutions are too much tied to the specific laws of Virginia to be closely copied by other jurisdictions in the United States, or England, or the Continental nations. More importantly, the Virginia institutions arose out of and adapted themselves to the legal culture of Virginia which exists at the present moment. The present political and legal assumptions and expectations did not exist a hundred years ago nor will they remain for a hundred years. Institutions evolve.

Even so, it is useful to consider them for comparative purposes. The Virginia system of institutions concerned with procedural reform can provide some ideas that might be instructive for other jurisdictions.

It seems to this writer that the key element for success in procedural reform is the careful study of the situation to be improved by those actively and closely involved in the situation as well as those who have the power to effectuate any agreed-upon reform. In addition to having the perspectives of some persons who are involved on both sides and at each level of procedure, it will be useful to have an historical perspective. An historian of civil procedure can explain why something was done in a particular way in the past and whether it was good or not and whether it should be retained in the present or not.